Nos. 92-745 (4)
92-1063 (3)

Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

In re MOSES N. ASLAN,
Debtor.

THE HONGKONG AND SHANGHAI BANKING CORPORATION AND CENTRAL BANK,
Petitioners,

vs.

MOSES N. ASLAN,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF THE HONGKONG AND SHANGHAI BANKING CORPORATION AND CENTRAL BANK IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In their Cross-Petition for Writ of Certiorari (the "Cross-Petition"), The Hongkong and Shanghai Banking Corporation ("Hongkong Bank") and Central Bank (sometimes collectively "the Banks") argued that if (and only if) the certiorari petition of Moses N. Aslan ("Aslan") were granted, *then* due process would

require that the Banks be afforded a hearing on whether Aslan, if he is excused from paying $2,000,000 of the Banks' judgment amount, is still entitled to a contractual credit against the judgment amount.

In his Brief in Opposition,[1] Aslan makes four specious arguments:

1. Aslan argues that the only evidence before the lower courts that his indebtedness to the Banks resulted from a check kite was inadmissible hearsay. Aslan's argument is unavailing, because (a) no objection was made to the evidence in question; and (b) all the evidence Aslan now challenges constituted *his own admissions*, which obviously were not hearsay at all. Moreover, even if, contrary to *all* the evidence, Aslan somehow could establish that he took the Banks' millions with their consent, the Banks' claims have been reduced to a final judgment, making the basis for the claims irrelevant to Aslan's arguments.

2. Aslan urges that Hongkong Bank, a foreign corporation, and Central Bank, the subsidiary of a foreign bank, are not entitled to due process of law and, therefore, cannot have the hearing they request. That argument contravenes all applicable authority. Foreign corporations may not have their valuable assets confiscated without due process.

3. Aslan asserts that due process for the Banks would not require, in any event, an evidentiary hearing. Again, Aslan's argument contravenes the authorities. Property rights cannot be taken without a meaningful opportunity to be heard.

4. Finally, Aslan asserts that Rule 10.1 of the Rules of this Court does not apply because the Court of Appeals did not depart from the usual course of judicial proceedings. Under Rule 10.1, this Court plainly has the power to review the entire case, such that *if* Aslan's Petition is granted, *then* the Banks' Cross-Petition

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[1]Aslan has filed a brief in opposition to the Banks' Cross-Petition, but no reply brief on his own Petition for Writ of Certiorari. Accordingly, this Reply Brief by the Banks addresses only those new issues raised in Aslan's Brief in Opposition.

may be considered, in order to *prevent* a departure from the usual course of proceedings and a miscarriage of justice.

ARGUMENT

1. There Is Overwhelming Evidence Of The Check Kite.

Aslan first argues that all the evidence that he incurred his $8.3 million debt to the Banks through a check kite was inadmissible hearsay.

Even if his argument were correct, it would not affect the Banks' rights under the final Judgment, or under the Letter Agreement which gave Aslan a credit against the Judgment conditioned on his full performance and ratification of the Judgment. However, all the evidence cited by the Banks was admissible in any event.

The evidence attacked by Aslan consisted of declarations (a) by persons to whom Aslan admitted the check kite, and (b) by Aslan's former counsel, Charles T. Rose ("Rose"). However, the declarations recited *admissions* made by Aslan, which are not hearsay but fall within a well settled exception to the hearsay rule. Fed. R. Evid. 801(d)(2). Moreover, Rose's statements were not protected by the attorney-client privilege, because Aslan had already commenced a malpractice action against Rose. [Aslan's Opposition Brief, at p. 6; Cal. Evid. Code § 958.] Further, Aslan has waived any evidentiary objections by failing to make them below.

Finally, Aslan has not offered in this Court, nor did he offer in the courts below, any alternative explanation of how he incurred his indebtedness to the Banks. It was, purely and simply, a check kite.

2. Foreign-Owned Corporations Are Entitled To Due Process.

In his Brief in Opposition, Aslan asserts that he "can find no authority for the basic premise upon which the Cross-Petition relies; that the Cross-Petitioners, banking corporations which are wholly-owned subsidiaries of foreign corporations, and [*sic*] 'persons' within the meaning of the Fifth Amendment." Aslan con-

cedes, however, that "[i]t is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment,' *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9, 105 S.Ct. 1676, 1683 n.9, 84 L.Ed. 2d 751 (1985), and that alien individuals are protected by the due process clause of the Fifth Amendment, *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed. 2d 478 (1976)." Oppos. Brief at 8 n.2. The principles conceded by Aslan defeat his argument that the Banks have no due process rights.

In *United States v. Verdugo-Urquidez*, 494 U.S. 1092, 110 S.Ct. 1056, 1064, 108 L.Ed. 2d 1968 (1990), this Court observed that a series of United States Supreme Court decisions has held that aliens enjoy certain constitutional rights. Among other things, resident aliens are "persons" within the meaning of the Fifth Amendment. *Id.* at 1064; *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596, 73 S.Ct. 472, 97 L.Ed. 576 (1953). Therefore, even if the Banks were considered resident aliens because of their foreign connections, that would not derogate from their status as persons within the meaning of the Fifth Amendment.

In Russian Volunteer Fleet v. United States, 282 U.S. 481, 491, 51 S.Ct. 229, 75 L.Ed. 2d 473 (1931), the Supreme Court held that a corporation organized under the laws of Russia was an alien friend, entitled to the Fifth Amendment due process protections against the taking of property.

> "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our government which the Constitution does not make dependent upon the standards of other governments." 282 U.S. at 491-492.

Thus, "[e]ven non-resident aliens are entitled to the protection of the Fifth Amendment's prohibition on unlawful takings." *Alvarez-Mendez v. Stock*, 746 F.Supp. 1006, 1015 (C.D. Cal. 1990), *aff'd*, 941 F.2d 956 (9th Cir. 1991).

Under all these authorities, it is manifest that the Banks are entitled to the due process protections of the Fifth Amendment.

3. Due Process Requires That If Aslan Succeeds In Reducing The Amount Of The Banks' Judgment, The Banks Then Are Entitled To An Evidentiary Hearing On Whether Consideration For The Rowan Building Credit Has Failed.

In his Opposition, Aslan argues that because the lower courts considered the parties' rights with regard to the Rowan Building credit under the Letter Agreement at the time Aslan's "penalty" argument was before the courts, therefore the Banks have already had the only hearing to which they are entitled.

Aslan ignores both the applicable case law on the subject of what constitutes a hearing that comports with due process requirements, and also the fact that the Banks' Cross-Petition is expressly linked to Aslan's Petition.

The Banks' argument, to the effect that if Aslan successfully attacks the Judgment, consideration for the Letter Agreement has failed and the Banks need not give him the Rowan Building credit hereunder, has not been the subject of an evidentiary hearing, for the simple reason that Aslan's attacks on the Judgment have been rejected at every stage. The lower courts have held in effect that because the Banks are receiving the entire amount of the Judgment and Aslan's attacks on the Judgment have been rejected, the Banks have nothing to complain about.

That may change if Aslan obtains a favorable result in this Court, or upon remand from this Court. No hearing has been held on whether, if Aslan succeeds in reducing the Judgment, he then has forfeited any benefits under the Letter Agreement. The Banks seek a hearing on that limited question, if and only if Aslan's Petition is granted.

4. The Banks Are Entitled To A Meaningful Hearing.

In *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976), this Court stated:

> "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " [Citations omitted.]

Further, the court in *Mathews*, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), stated: "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." The Court listed three factors relevant to determining if official action comports with due process rights: (1) the private interest affected; (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value of additional or substitute safeguards; (3) and the government's interest. 424 U.S. at 335. *Accord, Little v. Streater*, 452 U.S. 1, 6, 101 S.Ct. 202, 68 L.Ed.2d 627 (1981).

In *Orloff v. Cleland*, 708 F.2d 372, 379 (9th Cir. 1983), the Court of Appeals observed that under *Mathews*: "The central meaning of procedural process is that parties whose rights are to be affected are entitled to be heard at a meaningful time and in a meaningful manner." Similarly, in *Propert v. District of Columbia*, 948 F.2d 1327 (D.C. Cir. 1991), the Court stated "The constitutional requirement of some kind of hearing means, at a minimum, that the affected individual must have a meaningful opportunity to present his case before a neutral decision maker." *Id.* at 1333.

Under these standards, it is clear that if Aslan obtains a $2,000,000 advantage, in contravention of the Letter Agreement in which he agreed to pay the entire Judgment amount, then the Banks should receive a hearing.

First: The private interest affected is the right to more than $3.1 million plus interest, not a trivial sum.

Second: Because there has been no evidentiary hearing on the question, there is a serious risk that the Banks will be deprived of their rights if Aslan prevails on his "penalty" argument. Indeed, as the Banks have explained in their Cross-Petition, the lower courts held that the Banks had obtained all the benefits of the Judgment, and therefore Aslan was entitled to retain the consideration that had passed to him under the Letter Agreement. If Aslan succeeds in depriving the Banks of the benefit of the Letter Agreement, then it seems likely that, upon remand, the lower courts would examine, and change their position on, whether the Banks had obtained the consideration for which they had bargained in exchange for giving Aslan the conditional Rowan Building credit.

Third: If Aslan's Petition is granted, reviewing the entire case, either in this Court or on remand, will not result in a cognizably greater burden on the Court system than if Aslan's arguments were reconsidered in isolation.

Under these circumstances, there is no justification for allowing Aslan a $2,000,000 reduction of the Judgment, without at the same time giving the Banks a full and fair opportunity to argue that such a result deprives Aslan of any right to further savings under the Letter Agreement.

5. This Court May Grant The Cross-Petition.

Aslan argues that the Cross-Petition must be denied because Rule 10.1(a) only provides for certiorari where a "court of appeals . . . has . . . departed from the accepted and usual course of judicial proceedings". Here, Aslan's argument goes, any such departure would be by this Court, or by the lower courts after remand.

Aslan's argument is entirely unavailing.

First, Rule 10.1 by its own language is "neither controlling nor fully measuring the Court's discretion" to grant a writ of certiorari. Indeed, the Cross-Petition cites (at p. 6, n. 2) authority for

the proposition that the Court may review the Banks' claims *sua sponte*. Further, "[a] petition for writ of certiorari can expose the entire case to review." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988).

Second, and in any event, the Banks contend that if Aslan prevailed on his argument but the Banks were foreclosed from making theirs, that result would be a radical departure "from the accepted and usual course of judicial proceedings."

In short, if Aslan's petition is granted and receives favorable action, this Court's power also to review the Banks' claims is not restricted.

6. Conclusion.

Aslan's Opposition fails to recognize that the Banks seek relief only if, and to the extent that, Aslan obtains a favorable disposition on his Petition. Equity and due process require that if Aslan prevails on his claims, and the Judgment amount is reduced, the Banks at least receive a hearing on whether they still must give Aslan the benefit of a Letter Agreement, the consideration for which was ratification and payment of the *entire* Judgment.

For all the reasons stated herein and in the Cross-Petition, the Banks respectfully submit that Aslan's Petition should be denied; but that if Aslan's Petition is granted, this Cross-Petition also should be granted so that the entire case may be remanded for any appropriate proceeding in the Bankruptcy Court.

Respectfully submitted,

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February 12, 1993
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